

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FIRST CLASS PIZZA & RESTAURANT, INC. :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1995 through :
May 31, 1998. :

In the Matter of the Petition :
of :
ARSILIO DONOFRIO :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1996 through :
May 31, 1998. :

ORDER
DTA NOS.
818049 AND 818050

Petitioners, First Class Pizza & Restaurant, Inc. and Arsilio Donofrio, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1995 through May 31, 1998 and June 1, 1996 through May 31, 1998, respectively.

A small claims hearing was scheduled before Brian Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on Wednesday, May 29, 2002 at 1:15 P.M. Petitioners failed to appear and a default determination was duly issued. Petitioners have made a written request that the default determination be vacated.

Petitioners appeared on this motion by Isaac Sternheim, CPA. The Division of Taxation (“the Division”) appeared by Barbara G. Billet, Esq. (Phyllis Jacobson).

Upon a review of the evidence and arguments presented, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On September 29, 2000, the Division of Tax Appeals received petitions from First Class Pizza & Restaurant, Inc. and Arsilio Donofrio protesting additional sales and use taxes asserted pursuant to assessments L017008993 and L017139425, respectively. Neither petition included a copy of the assessment document or specified the nature of the disagreement between petitioners and the Division of Taxation. Both petitions merely asserted that “The assessment is arbitrary and does not reflect the correct amount of tax due.”

2. These matters were first scheduled as formal hearings to be heard by an administrative law judge. However, petitioners elected to have their cases heard as small claims proceedings. On April 22, 2002, the Calendar Clerk of the Division of Tax Appeals advised the parties that their hearing was scheduled to be heard on May 29, 2002. Separate hearing notices were mailed to each of the petitioners, to petitioners’ representative and to the Office of Counsel of the Division of Taxation.

3. On Wednesday, May 29, 2002 at 1:15 P.M., Presiding Officer Brian Friedman called these matters for hearing. Neither petitioners nor their representative appeared at the hearing. The Division of Taxation was represented by Phyllis Jacobson who moved for a default determination. On July 3, 2002, Presiding Officer Friedman issued a default determination against each of the petitioners.

4. On July 8, 2002, petitioners filed an application to vacate the default determination. Petitioners' application consisted of a letter from petitioners' representative wherein he indicated that they never received the Notice of Hearing for the May 29, 2002 hearing. The application did not address the merits of petitioners' case.

5. The Division of Taxation responded to the application in a letter dated July 18, 2002. Petitioners submitted a supplemental letter dated September 30, 2002. Neither letter addressed whether petitioners have established a reasonable excuse for failing to appear or whether they have established a meritorious case.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that

they have a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioners have not established a valid excuse for their failure to appear at the hearing. Other than a bare denial of receipt of the hearing notice, petitioners have submitted nothing to explain their failure to appear. It must be noted that hearing notices were separately mailed to each petitioner and to petitioners' representative. While it might be possible that a single notice might be lost or misdelivered by the U. S. Postal Service, it seems unlikely to me that all three of the notices would be lost or misdelivered at the same time. Certainly, if that is what petitioners are claiming, some explanation is necessary. Petitioners have provided no explanation whatsoever. Accordingly, I find that petitioners have not demonstrated that they had a reasonable excuse for failing to appear at their hearing and thus have failed to meet the first criterion to have the default order vacated.

D. Petitioners have also failed to establish a meritorious case. Petitioners have made no assertions whatsoever regarding the merits of their case. In fact, it is not possible to discern why petitioners think the relevant assessments are incorrect. Therefore, petitioners have failed to show a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued July 3, 2002 is sustained.

DATED: Troy, New York
October 17, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE